Supreme Court, U.S.
FILED
JAN 2 8 2004
OFFICE OF THE CLERK

No. 03-761

In the Supreme Court of the United States

RANCHO VIEJO, LLC,
Petitioner
v.
GALE A. NORTON, SECRETARY OF THE INTERIOR, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, DELAWARE, MICHIGAN, NEBRASKA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Congress's authority "[t]o regulate Commerce . . . among the several states," U.S. CONST. art. I, §8, cl. 3, permit the application of the Endangered Species Act to purely local activities that might potentially harm the habitat of a wholly intrastate and commercially-irrelevant toad species?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Index of Authorities iv

Interest of *Amici Curiae* 1

Reasons for Granting the Writ 2

I. The Endangered Species Act Impermissibly Intrudes Into the States' Traditional Management of Land Use and Purely Intrastate Wildlife, and Impedes the Effective Exercise of Their Police Powers 2

II. The Conflict Between the D.C. Circuit and the Fifth Circuit's Analysis of Congress's Commerce-Clause Authority Prevents the States from Ascertaining the Reach of the ESA, And Confuses Accepted Commerce-Clause Analysis 5

A. The Fifth Circuit Expressly Rejected the D.C. Circuit's Adoption of Commerce-Clause Analysis That Turns on the Character of the Actor Affected by the Federal Regulation 5

B. The Disagreement Between the D.C. Circuit and the Fifth Circuit About Aggregation of Non-Economic Activities Leaves Commerce-Clause Analysis in Confusion 7

C. The Fifth Circuit's Rationale Was Also Flawed and Its Analysis Was Inconsistent with the Approach of the D.C. Circuit 8

III. The D.C. Circuit's Inconsistency with This Court's Commerce-Clause Precedent Warrants Review 9

A. The D.C. Circuit's Approval of Congressional Regulation of Non-Economic Intrastate Activity Is at Odds with the Court's Insistence on Economic Activity 9

B. The D.C. Circuit's Focus on the After-Effects of a Regulation Contradicts the Court's Focus on Regulated Activities 11

C. The Court of Appeals's Decision Weakens the Court's Prohibition Against Attenuation to the Point of Non-Existence 12

D. In the Interests of Preservation of Our Dual Sovereignty and Federalism's Role as One of the Counter-Majoritarian Guarantees That Preserve Liberty, the Court Should Grant the Petition ... 15

Conclusion 16

INDEX OF AUTHORITIES

Cases

Coleman v. Thompson,
501 U.S. 722 (1991) 15

GDF Realty Investments, Ltd. v. Norton,
326 F.3d 622 (CA5 2003) 5, 6, 7, 8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 15

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 11

Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 11

Hughes v. Oklahoma, 441 U.S. 332 (1979) 2

Katzenbach v. McClung, 379 U.S. 294 (1964) 11

Lacoste v. Dep't of Conservation,
263 U.S. 545 (1924) 2

Lake Country Estates v. Tahoe Reg'l Planning Agency,
440 U.S. 391 (1979) 2

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (CA DC Cir.1997) 2

New York v. United States,
505 U.S. 144 (1992) 15

Perez v. United States, 402 U.S. 146 (1971) 11

Raich v. Ashcroft, 352 F.3d 1222 (CA9 2003) 14

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (CA DC 2003) 7, 10, 12

Rancho Viejo, LLC v. Norton,
334 F.3d 1158 (CA DC 2003) 5, 14

Saenz v. Roe, 526 U.S. 489 (1999) 15

Solid Waste Agency v. U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 2, 12

Terry v. Reno, 101 F.3d 1412 (CA DC 1996) 7

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 15

United States v. Darrington,
351 F.3d 632 (CA5 2003) 14

United States v. Laton,
352 F.3d 286 (CA6 2003) 14

United States v. Lopez,
514 U.S. 549 (1995) 2, 3, 5, 9-11, 13-15

United States v. McFarland,
311 F.3d 376 (CA5 2002) (*en banc*) 14

United States v. Morrison, 529 U.S. 598 (2000) 2, 5, 10-15

Wickard v. Filburn, 317 U.S. 111 (1942) 11

Wyo. Farm Bureau Fed'n v. Babbitt,
199 F.3d 1224 (CA10 2000) 9

Statutes, Rules, and Constitutional Provisions

ALASKA STAT. §§16.20.180–.210 1

CAL. FISH & GAME CODE §§2050–2115.5 1

COLO. REV. STAT. §§33-2-101– -108 1

CONN. GEN. STAT. §§26-303– -316 1

DEL. CODE tit. 7 §§601–605 1

FLA. STAT. §§372.072–.074 1

GA. CODE §§12-6-171– -176,
27-3-130– -133 1

HAW. REV. STAT. §§195D-2– -31 1

ILL. COMP. STAT. 10/1–10/11 1

IND. CODE §§14-22-34-1-- -21 1

IOWA CODE §§481B.1–.9 1

KAN. STAT. §§32-957– -963,
32-1009– -1012, 32-1033 1

KY. REV. STAT. §§146.600–.619, 150.183, 150.9990 1

LA. REV. STAT. §§56:1901– :1907 1

MASS. GEN. LAWS ch. 131A, §§1–6 ..... 1, 3

MD. CODE, NAT. RES. I §§4-2A-01– -09, 10-2A-01– -09 1

ME. REV. STAT. tit. 12, §§7751–7759 1

MICH. COMP. LAWS §§324.36501–.36507 1

MINN. R. 6134.0100-0400 1

MINN. STAT. §§84.0894–.0895 1

MISS. CODE §§49-5-101– -119 1

MO. REV. STAT. §252.240 2

MONT. CODE §§87-5-101– -131 1

N.C. GEN. STAT. §§113-331– -337, 106-202.12 1

N.H. REV. STAT. §§212-A:1– -A:15 1

N.J. Stat. §§23:2A-1– -14 1

N.M. STAT. §§17-2-37– -46 1

N.Y. ENVTL. CONSERV. LAW §11-0535 1

NEB. REV. STAT. §§37-801– -811 1

NEV. REV. STAT. §§244-386–.388, 503.584–.660 1

OHIO REV. CODE §§1531.24–.26, .99 1

OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502– -504, 7-601– -602 2

OR. ADMIN. R. 635-100-0105 1

OR. REV. STAT. §§496.004, .171, .172– -192, 498.026, 527.610–527.885, 527.992, 564.100–.135 1

17 PA. CODE §§45.31–.35 1

30 PA. CONS. STAT. §2305 1

34 PA. CONS. STAT. §2167 1

R.I. GEN. LAWS §§20-37-1– -5 1

S.C. CODE §§50-15-10– -90 1

S.D. CODIFIED LAWS 34A-8-1– -13 1

TENN. CODE §§70-8-101– -112 1

30 TEX. ADMIN. CODE §330.129 1

31 TEX. ADMIN. CODE §§65.171, 69.1 ..... 1, 3

TEX. PARKS & WILD. CODE §§49.015, 68.001– .021 1

U.S. CONST. art. I, §8, cl. 3 i

18 U.S.C. §922(g)(1) 14

21 U.S.C. §801 14

UTAH CODE §§23-13-1– -17 1

VA. CODE §§29.1-563– -570 1-2

VT. STAT. tit. 10, §§5401–5410 1

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WIS. STAT. §29.604 2

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Ben Goad & Jennifer Bowles, *Fire Official Faults Agency//Habitat; Fish and Wildlife Lets Growth Fears Delay Needed Burns, an Inland CDF Chief Says*, THE PRESS-ENTERPRISE, Dec. 16, 2003 3

Jia-Rui Chong, *California; Federal Agency Faulted in Fires; San Bernadino Officials Say the Fish and Wildlife Service Held Up Crucial Controlled Burns*, LOS ANGELES TIMES, Dec. 15, 2003 3

THE FEDERALIST No. 45
(Clinton Rossiter ed. 1961) 14

Wes Smalling, *Forests, Fire and Fate*,
THE SANTA FE NEW MEXICAN,
Aug. 10, 2003 ..... 3, 4

INTEREST OF *AMICI CURIAE*

The *Amici* States have a long history of protecting wildlife and serving as responsible stewards of our precious natural resources. For that reason, the *Amici* States have a significant interest in maintaining their sovereign control over wildlife regulation and land-use planning within their borders. The court of appeals's decision threatens state control over such decisions and allows Congress to regulate matters of purely state concern without any requirement of a genuine connection to interstate commerce. Moreover, the holding and reasoning of the court of appeals threatens the *Amici* States' ability to develop and administer their own state endangered-species programs.[1] The *Amici* States file this

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1. *See* ALASKA STAT. §§16.20.180–.210; CAL. FISH & GAME CODE §§2050–2115.5; COLO. REV. STAT. §§33-2-101– -108; CONN. GEN. STAT. §§26-303– -316; DEL. CODE tit. 7 §§601–605; FLA. STAT. §§372.072–.074; GA. CODE §§12-6-171– -176, 27-3-130– -133; HAW. REV. STAT. §§195D-2– -31; ILL. COMP. STAT. 10/1–10/11; IND. CODE §§14-22-34-1– -21; IOWA CODE §§481B.1–.9; KAN. STAT. §§32-957– -963, 32-1009– -1012, 32-1033; KY. REV. STAT. §§146.600–.619, 150.183, 150.9990; LA. REV. STAT. §§56:1901– :1907; ME. REV. STAT. tit. 12, §§7751–7759; MD. CODE, NAT. RES. I §§4-2A-01– -09, 10-2A-01– -09; MASS. GEN. LAWS ch. 131A, §§1–6; MICH. COMP. LAWS §§324.36501–.36507; MINN. STAT. §§84.0894–.0895; MINN. R. 6134.0100-0400; MISS. CODE §§49-5-101– -119; MONT. CODE §§87-5-101– -131; NEB. REV. STAT. §§37-801– -811; NEV. REV. STAT. §§244-386–.388, 503.584–.660; N.H. REV. STAT. §§212-A:1– -A:15; N.J. Stat. §§23:2A-1– -14; N.M. STAT. §§17-2-37– -46; N.Y. ENVTL. CONSERV. LAW §11-0535; N.C. GEN. STAT. §§113-331– -337, 106-202.12; OHIO REV. CODE §§1531.24–.26, .99; OR. ADMIN. R. 635-100-0105; OR. REV. STAT. §§496.004, .171, .172–.192, 498.026, 527.610–527.885, 527.992, 564.100–.135; 30 PA. CONS. STAT. §2305; 34 PA. CONS. STAT. §2167; 17 PA. CODE §§45.31–.35; R.I. GEN. LAWS §§20-37-1– -5; S.C. CODE §§50-15-10– -90; S.D. CODIFIED LAWS 34A-8-1– -13; TENN. CODE §§70-8-101– -112; TEX. PARKS & WILD. CODE §§49.015, 68.001– .021; 30 TEX. ADMIN. CODE §330.129; 31 TEX. ADMIN. CODE §§65.171, 69.1; UTAH CODE §§23-13-1– -17; VT. STAT. tit. 10, §§5401–5410; VA. CODE

brief to assert their interest in restoring state control over their resources and returning to the federal-state balance of power secured by the Constitution.

REASONS FOR GRANTING THE WRIT

I. THE ENDANGERED SPECIES ACT IMPERMISSIBLY INTRUDES INTO THE STATES' TRADITIONAL MANAGEMENT OF LAND USE AND PURELY INTRASTATE WILDLIFE, AND IMPEDES THE EFFECTIVE EXERCISE OF THEIR POLICE POWERS.

As the Court has recognized, land use is traditionally an area of state concern. *See, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). Likewise, the conservation and protection of wildlife is also peculiarly within the States' police power, and the States have great latitude in determining the means for that protection.[2] *See Lacoste v. Dep't of Conservation*, 263 U.S. 545, 552 (1924); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (CA DC Cir.1997) (Sentelle, J., dissenting); *see also Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979) (stating that wildlife protection is a legitimate local purpose, similar to the States' interest in protecting the health and safety of their citizens).

Consistent with this tradition, forty States have independent regulatory schemes governing endangered species. *See supra*

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§§29.1-563--570; WASH. REV. CODE §§77.12.020, 77.08.010, 77.15.055, 79.17.040; WIS. STAT. §29.604; *see also* MO. REV. STAT. §252.240; OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502--504, 7-601--602.

2. Other areas of traditional state concern include education, criminal law enforcement, and family law. *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 564 (1995); *id.*, at 580 (Kennedy, J., concurring).

note 1. Several States go even farther, protecting "threatened" species as well. *See, e.g.*, 31 TEX. ADMIN. CODE §§65.171-.184, 69.01-.14; MASS. GEN. LAWS Ch. 131A, §§1-6. Any fear that, without the ESA's application to all intrastate species, endangered species would somehow go unprotected is dispelled by these many state programs. By displacing the state policy choices expressed by state laws protecting endangered species, however, the ESA renders the States' statutes and regulations largely irrelevant and discourages the further development of state regulatory schemes. The States should be allowed, and encouraged, to continue "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S., at 581 (Kennedy, J., concurring).

Not only does the ESA improperly displace the States' efforts to manage wildlife that is unrelated to interstate commerce, the ESA hinders the States in the execution of their police powers as well as their established authority to regulate land use. For example, the ESA has impeded local efforts in several States to clear trees and brush in order to prevent forest fires. *See, e.g.*, Wes Smalling, *Forests, Fire and Fate*, THE SANTA FE NEW MEXICAN, Aug. 10, 2003, at A1; Ben Goad & Jennifer Bowles, *Fire Official Faults Agency//Habitat; Fish and Wildlife Lets Growth Fears Delay Needed Burns, an Inland CDF Chief Says*, THE PRESS-ENTERPRISE, Dec. 16, 2003, at A01 (discussing arroyo toad); Jia-Rui Chong, *California; Federal Agency Faulted in Fires; San Bernadino Officials Say the Fish and Wildlife Service Held Up Crucial Controlled Burns*, LOS ANGELES TIMES, Dec. 15, 2003, at B1. The ESA's prevention or lengthy delay of clearing projects potentially caused, or at least contributed to, the catastrophic fires that occurred in Southern California last year. *See Smalling, supra*; Goad & Bowles, *supra*; Chong, *supra*. In addition to threatening human lives, property, and land, these fires can have potentially devastating collateral effects, such as destruction of critical water supplies. *See*

Smalling, *supra*. Protecting state citizens and their property, as well as safeguarding state forests and water supplies, are undeniably legitimate exercises of States' traditional police powers and should not be constrained by federal regulation of species with no connection to interstate commerce.

In addition to inhibiting the States by extending to species that are outside of Congress's scope of authority, the ESA's take provision also imposes remedies where they already exist. The States have developed protective measures and remedies, *see supra* note 1, and the take provision's needless overlap with some of those requirements, together with its overriding of several others, make it as unnecessary as it is improper when applied to intrastate, non-commercial species. Moreover, the friction between the policy choices of unelected federal officials and state legislatures over the appropriate designation and management of endangered species, as well as the proper sanctions for conduct adversely affecting such a species, only underscores the sensitivity of the issue and the constitutional issues at stake.

The court of appeals's decision validates a federalization of the control of land development through the ESA's take provision. And it ignores the fact that federal control of state resources conflicts with the States' historical independence in carrying out their domestic policy. Forty States have their own endangered species programs, and they must know the limits of Congress's reach in order to plan and administer their programs. Given our Constitution's concern with comity and limited federal power, the Court should grant the petition and review the take provision's impact on the federal-state balance.

II. THE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE FIFTH CIRCUIT'S ANALYSIS OF CONGRESS'S COMMERCE-CLAUSE AUTHORITY PREVENTS THE STATES FROM ASCERTAINING THE REACH OF THE ESA, AND CONFUSES ACCEPTED COMMERCE-CLAUSE ANALYSIS.

Although both ultimately upheld the constitutionality of the ESA, the D.C. Circuit and the Fifth Circuit are divided in their rationales and approach for sustaining the ESA take provision as it applies to non-commercial, intrastate species. The result is that one circuit's commerce-clause analysis permits applications of the take provision that would not be countenanced in the other circuit. That conflict requires resolution by the Court.

A. The Fifth Circuit Expressly Rejected the D.C. Circuit's Adoption of Commerce-Clause Analysis That Turns on the Character of the Actor Affected by the Federal Regulation.

The Fifth Circuit explicitly rejected the brand of commerce-clause analysis adopted by the D.C. Circuit, which measures the reach of Congress's authority by the character of the affected party. Maintaining the commerce-clause analytical inquiry in its proper place, the Fifth Circuit instead assessed the regulated activity, as opposed to the character of the regulated actor. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (CA5 2003) (explaining that "looking primarily beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the Commerce Clause," and that under such an approach, "the facial challenges in *Lopez* and *Morrison* would have failed"). In contrast, the D.C. Circuit decided to assessed the *effects* of the challenged regulation on interstate commerce rather than "the *activity* being regulated." *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (CA DC 2003) (Roberts, J., dissenting from denial of rehearing en banc).

As the Fifth Circuit explained, the D.C. Circuit's erroneous approach fails to identify the limits of Congress's authority, and instead assesses the affected party's connection to interstate commerce, requiring only that affected parties exhibit general commercial indicia:

> "To accept [such] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *GDF Realty*, 326 F.3d, at 634-35.

In the Fifth Circuit, the fact that GDF Realty was engaged in economic activity—commercial real estate development—was simply immaterial. The Fifth Circuit explained that consideration of GDF Realty's "commercial motivations that would underlie the takes" would improperly extend "the scope of this relevant conduct beyond . . . takes." *Id.*, at 633. Unlike the D.C. Circuit, the Fifth Circuit concluded that the proper scope of inquiry is "whether the expressly regulated activity substantially affects interstate commerce, *i.e.*, whether takes . . . have the substantial effect." *Id.* (emphasis omitted).

Thus, the two circuits fundamentally disagree about what a court is to analyze when it looks for the necessary substantial effects on interstate commerce. In one circuit, a court should consider the front-end subject matter of the statute, not the back-end secondary effects of the statute as applied to the facts of a particular case; and in other circuit, the opposite is true. In this case, depending on the circuit, the proper inquiry is either whether a take of an arroyo toad substantially affects interstate commerce, or whether the ultimate hindrance of commercial development of a property (in the name of preventing a take) substantially affects interstate commerce.

By ignoring the actual subject matter of the statute, the D.C. Circuit's analysis leads to inconsistent results depending on nature of the actor. Implicit in its conclusion that the regulated activity was real estate development, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (CA DC 2003), is a recognition that a take by a non-commercial actor would not substantially affect interstate commerce. If a landowner wanted to eliminate arroyo toads for sport, for religious reasons, for aesthetic preference, or for simple whimsy, the court of appeals's analysis would not support the application of the take provision. That inconsistency undermines the D.C. Circuit's analysis altogether; the constitutionality of the take provision should not turn on the happenstance of the taker's intent or character, nor should it turn on geographic fortuity.

Moreover, the self-justifying nature of the D.C. Circuit's analysis encourages broad, non-specific, and intrusive enactments. No matter what the subject matter, the greater the potential impact of a statute, even if completely unintended, the more likely it is to be upheld on commerce-clause grounds. The capricious results of the D.C. Circuit's analysis, together with its conflict with the Fifth Circuit regarding the proper object of commerce-clause analysis, warrant the Court's examination.

B. The Disagreement Between the D.C. Circuit and the Fifth Circuit About Aggregation of Non-Economic Activities Leaves Commerce-Clause Analysis in Confusion.

In *GDF Realty*, the Fifth Circuit correctly concluded that for any aggregation, "the intrastate instance of activity be commercial." 326 F.3d, at 638. In contrast, the D.C. Circuit rejected the contention that non-economic taking activity [must] could not be aggregated, *Rancho Viejo*, 323 F.3d, at 1071-72 & n.10; *see also Terry v. Reno*, 101 F.3d 1412, 1417 (CA DC 1996) ("The regulated activity . . . need not be commercial, so long as its effect on

interstate commerce is substantial."). The Fifth Circuit explained that if aggregation is utilized to sweep in "any imaginable activity," then it would be preordained that aggregated non-economic activities could in domino effect "reduce national economic productivity," leaving Congress's commerce-clause power without limit. *GDF Realty*, 326 F.3d, at 629. Such reasoning would turn the Commerce Clause "into what it most certainly is not, a general police power." *Id.* (emphasis omitted).

The disagreement between the two circuits regarding proper aggregation injects yet more confusion into the state of commerce-clause analysis, precluding any predictable analysis for the States and providing further reason for the Court's review.

C. The Fifth Circuit's Rationale Was Also Flawed and Its Analysis Was Inconsistent with the Approach of the D.C. Circuit.

The Fifth Circuit ultimately sustained the application of the take provision to intrastate, non-commercial species because it viewed the ESA as a whole as "an economic regulatory scheme," *id.*, at 640, and decided that takes of an intrastate, non-commercial species could be aggregated with other takes because, in its view, the regulation of any species is an essential part of the larger regulatory scheme, *id.*, at 638-39, 640. In so concluding, the Fifth Circuit accepted a premise advanced by the Fish and Wildlife Service—a premise that was not relied upon by the D.C. Circuit—that takes of *any* species necessarily threaten the "interdependent web" of all species. *See id.*, at 640. Through this "interdependent web" conjecture, the Fifth Circuit collapsed activities related to commercial and interstate species with the admittedly non-commercial, Texas cave species at issue in *GDF Realty*.

The D.C. Circuit did not rely on the interdependent web theory; instead, it relied upon the commercial nature of the affected actor. This incongruity provides further reason for the Court's review.

III. THE D.C. CIRCUIT'S INCONSISTENCY WITH THIS COURT'S COMMERCE-CLAUSE PRECEDENT WARRANTS REVIEW.

Both circuits' rationales are not only at odds with each other, but they are inconsistent with this Court's commerce-clause precedent and the Court's insistence on a meaningful distinction between that which is national and that which is truly local.

The Court has construed the Commerce Clause to permit Congress to regulate three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S., at 557-59. It is common ground that the take provision does not come within the first two commerce-clause safe harbors. With regard to the last category, the key inquiry is whether the regulated activity "substantially affects" interstate commerce, 514 U.S., at 557 n.2, 562, or whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial, *id.*, at 563-67, that is, whether the rationale "would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.*, at 567. The court of appeals's decision runs afoul of the Court's mandate that substantial effects must be understood to impose meaningful limits on congressional power under the Commerce Clause.

A. The D.C. Circuit's Approval of Congressional Regulation of Non-Economic Intrastate Activity Is at Odds with the Court's Insistence on Economic Activity.

The take provision's purpose is wildlife preservation, not economic regulation. *See, e.g., Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (CA10 2000). And there is no dispute that there is no national market for arroyo toads, nor any evidence suggesting that the toads are the subject of any

commercial activity. *See Rancho Viejo*, 323 F.3d, at 1072. Nevertheless, because the affected party was commercial, the D.C. Circuit authorized the application of the take provision to the intrastate toad.

The D.C. Circuit's endorsement of congressional regulation of local activities affecting species lacking commercial effects stands conspicuously apart from the Court's decisions linking commerce-clause authority to economic activity. In *Lopez* and *Morrison*, the Court recognized that the Commerce Clause does not extend to non-commercial intrastate activity. *Morrison*, 529 U.S., at 611, 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Lopez*, 514 U.S., at 559-61 (explaining that Gun-Free School Zones Act had nothing to do with "commerce" or any sort of economic enterprise); *id.*, at 580 (Kennedy, J., concurring) (observing that neither the actors nor their conduct had commercial character, nor did the statute evidence a commercial nexus). Moreover, the Court's review of commerce-clause decisions in *Morrison* and *Lopez* demonstrates that when the Court has sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. *Morrison*, 529 U.S., at 611; *Lopez*, 514 U.S., at 559-60. The necessity of economic activity is confirmed by *Morrison*'s express rejection of the claim that Congress could regulate non-economic conduct based solely on that conduct's aggregate effect on interstate commerce. 529 U.S., at 617. While one can always identify commercial effects of non-economic regulation, as the losing parties had done in both *Lopez* and *Morrison*, the Court made clear that intrastate activity must be economic to be regulated. *Id.*, at 610-11 (citing *Lopez*, 514 U.S., at 559).

Nothing about the application of the take provision in this case suggests any economic or commercial activity. Even under the most indulgent view, application of the take provision to non-

commercial, intrastate species has far fewer commercial qualities than the guns-around-schools legislation invalidated in *Lopez*. *See Lopez*, 514 U.S., at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). And the provision does not approach such economic activities as intrastate coal mining, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), inns and hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), restaurants using substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294 (1964), or even—with the reach of the Commerce Clause at its apogee—the production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942).

The commercial nature of these activities simply finds no parallel in the application of the take provision to the intrastate arroyo toad. As in *Lopez*, the application of the take provision "has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S., at 561. The take provision applied to an intrastate species without commercial effect simply does not "substantially affect" interstate commerce, at least if this limit on congressional authority is to remain meaningful.

B. The D.C. Circuit's Focus on the After-Effects of a Regulation Contradicts the Court's Focus on Regulated Activities.

The court of appeals's effects-based analysis largely ignores Congress's actual intentions and, consequently, is foreign to the four-part review required by *Morrison*. *See* 529 U.S., at 609-12. By looking for a jurisdictional element and reviewing congressional findings regarding the regulated activity's effect on interstate commerce, the *Morrison* formulation leaves no doubt that the

proper focus of commerce-clause analysis is the direct subject of the statute (*i.e.*, taking of intrastate non-commercial species), rather than some unspecified effect that is only later discovered and is dependent on the specific actor in question. Indeed, in *Solid Waste Agency*, the Court noted that aggregation based on the nature of the actor, rather than on the activity that was the object of the regulation, "would raise significant constitutional questions." 531 U.S., at 173-74. Contradicting the Court's focus on the activity "to which the statute by its terms extends," *id.*, the D.C. Circuit limited itself to the nature of the affected party and his activity, holding that the "precise activity" to be considered was the planned commercial development, *Rancho Viejo*, 323 F.3d, at 1072. This inconsistency with the Court's decisions provides yet another reason for the Court's review.

C. The Court of Appeals's Decision Weakens the Court's Prohibition Against Attenuation to the Point of Non-Existence.

The court of appeals's approval of an extremely attenuated connection to interstate commerce effectively eliminates the distinction between what is national and what is local. The court of appeals engaged in the very same kind of attenuated reasoning to justify congressional regulation of intrastate activities that the Court rejected in *Lopez* and *Morrison*. *See Morrison*, 529 U.S., at 612; *Lopez*, 514 U.S., at 567.

The court of appeals's reasoning makes a plausible case for the position that activities of one intrastate species, might like a rock thrown into a pond, have effects that could lead to other effects that would potentially affect interstate commerce. But that argument proves too much; such reasoning would allow Congress to regulate any intrastate activity, including areas of traditional state regulation, such as education, crime, and family law. *See Morrison*, 529 U.S., at 615-16; *cf.*, *Lopez*, 514 U.S., at 564. *Lopez* and *Morrison* both

rejected this rationale as inconsistent with the doctrine of enumerated federal powers. *Morrison*, 529 U.S., at 616-18; *Lopez*, 514 U.S., at 567-68. Like the regulation of intrastate violence invalidated in *Morrison*, the regulation of intrastate species that is not directed at the instrumentalities, channels, or goods involved in intrastate commerce "has always been the province of the states." 529 U.S., at 618. The activities at issue are inherently local in nature, and involve precisely the kinds of policy choices that State governments have historically been responsible for making.

The rationale offered by the court of appeals for meeting the "substantial effects" test also fails to circumvent the same pitfall that doomed the law at issue in *Lopez*. In *Lopez*, the rationales offered to sustain the law each violated the bedrock principle animating the Court's commerce-clause cases—that is, whatever the explanation for the exercise of power, it cannot convert a commerce power of limited reach into one of unbounded breadth. 514 U.S., at 563-68. The government, for example, argued that firearms possession in a school zone could result in violent crime, which in turn could create substantial insurance costs throughout the country or create disincentives to travel to parts of the country that appeared to be unsafe. *Id.*, at 563-64. It also argued that firearms possession in a school zone could threaten the learning environment, which in turn could result in a less productive citizenry. *Id.*, at 564. The problem, the Court concluded, was that it was "hard pressed to posit any activity by an individual that Congress is without power to regulate" under these explanations. *Id.* The D.C. Circuit's reasoning similarly lacks a stopping point.

The D.C. Circuit's attenuated connection to interstate commerce abandoned the Court's view that "the Constitution's enumeration of powers . . . presuppose [s] something not enumerated" and in the process abandoned the "distinction between what is truly national and what is truly local." *Id.*, at 567-68. As the Court reaffirmed in *Lopez* and *Morrison*, the powers delegated to the federal

government are few and defined, while those that remain in the state governments are numerous and indefinite. *Morrison*, 529 U.S., at 618 & n.8; *Lopez*, 514 U.S., at 552 (citing THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)). The D.C. Circuit's reasoning turns this balance on its head by granting the federal government essentially a broad police power over endangered species, regardless of their connection to interstate commerce.[3]

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3. This conflict is clear today and is unlikely to sharpen or develop any further with the passage of time. *See Rancho Viejo*, 334 F.3d, at 1160 (Sentelle, J., dissenting from denial of rehearing en banc) ("This decision of the court continues a line of cases in conflict with Supreme Court jurisprudence . . .".). Nor can it be resolved without the Court's review. Indeed, the court of appeals's decision is emblematic of the confusion in the lower courts regarding Congress's commerce-clause authority. *See, e.g., Raich v. Ashcroft*, 352 F.3d 1222 (CA9 2003) (enjoining as likely beyond Congress's commerce-clause authority, extension of Controlled Substances Act, 21 U.S.C. §801, to intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes); *United States v. Laton*, 352 F.3d 286 (CA6 2003) (rejecting, over Judge Sutton's dissent, commerce-clause challenge to federal arson statute applied to local fire station burned by local official); *United States v. Darrington*, 351 F.3d 632 (CA5 2003) (rejecting commerce-clause challenge to the felon-in-possession statute, 18 U.S.C. §922(g)(1)); *United States v. McFarland*, 311 F.3d 376 (CA5 2002) (*en banc*) (affirming conviction by reason of an equally divided court on the issue whether Congress has commerce-clause authority to extend the Hobbs Act to robberies of local retail stores). Moreover, because a decision by the D.C. Circuit on the proper scope of a federal regulation stands as substantial and unavoidable precedent in any circuit, it should not be left unreviewed.

D. In the Interests of Preservation of Our Dual Sovereignty and Federalism's Role as One of the Counter-Majoritarian Guarantees That Preserve Liberty, the Court Should Grant the Petition.

The division of authority in our federal system is not merely an empty distinction of a bygone era. *See Lopez*, 514 U.S., at 552. Rather, it continues to have force as a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Far from protecting state sovereignty for its own sake, the goal of federalism is to maintain the freedoms that only divided and dispersed government can provide. As the Court has recognized, "a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S., 452, 458-59 (1991).

No matter how virtuous the public policy objectives—making society safe for law-abiding citizens, rooting out gender-motivated violence, or even protecting our natural resources—there are necessarily constitutional limitations. *Cf. Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549. The Court's history is one of safeguarding structural and individual-rights guarantees of liberty against the exigencies of the moment. Just as the Court has not hesitated to consider issues of individual-liberty rights against society's need for collective security, nor hesitated to ensure an appropriate separation of powers among the national branches of government, it should likewise act to protect the foundational principle that Congress has limited and enumerated powers. The objective of the Framers after all was to "split the atom of sovereignty." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Because

federalism is a sustaining principle of our Republic, and the court of appeals's decision misapprehends the dividing line between the Congress and the sovereign states, the Court should grant the petition.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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January 2004

63